

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SELDEN CONVENIENCE FOODMART, INC.	:	
AND TABINDA T. MAHMUD	:	ORDER
	:	DTA NO. 817531
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period June 1, 1994 through May 31, 1997.	:	

Petitioners, Selden Convenience Foodmart, Inc., and Tabinda T. Mahmud, 485 Old Country Road, Dix Hills, New York 11746, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1994 through May 31, 1997.

On May 3, 2001, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the grounds that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation. Petitioners filed no response to the motion. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel). Based on the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation has shown that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation.

FINDINGS OF FACT

1. On January 31, 2000, the Division of Tax Appeals received a petition captioned: Selden Convenience Foodmart/Tabinda Mahmud. The petition references four assessment numbers: L014031683, L014454749, L014383922, L0140019401-1. Several issues are raised in the petition. The only issue relevant to this proceeding is petitioners' claim that they requested a conciliation conference on November 24, 1997 and again on June 4, 1998 and never received a response to either request.

2. Two requests for conciliation conference are attached to the petition. One request is dated August 25, 1997 and references Selden Convenience Food Mart, Inc. ("Selden") and assessment number L-014019401-2. The other request is dated November 13, 1997. It also references Selden and a second assessment number, L-014383922-9. Both requests bear an illegible signature, although the last name of the signature appears to be Mahmud on both documents.

3. A copy of a Conciliation Order Dismissing Request (CMS No. 177627), dated December 3, 1999, was attached to the petition. It references two of the assessment numbers shown on the petition: L014031683 and L014454749. The Conciliation Order, issued by the Bureau of Conciliation and Mediation Services ("BCMS"), dismissed the request for conference on the ground that the request was not filed within 90 days of the issuance of the notices.

4. The Division of Taxation ("Division") filed an answer to the petition on March 30, 2000. In that answer, the Division asserted that petitioners' request for a conference was not filed within 90 days of the issuance of the two notices referenced in the Conciliation Order. The Division also stated that the two notices referenced in the Conciliation Order (L014031683 and L014454749) were issued to Tabinda T. Mahmud. The Division states that the other notices

(L014383922, L0140019401-1) had been issued to Selden. The Division claimed that there was no power of attorney attached to the petition for Selden, and for that reason, it did not address any issues involving Selden.

5. The files of the Division of Tax Appeals include two powers of attorney: one power running from Tabinda Mahmud, as a responsible officer of Selden, to Jonathan Wolfsohn and one power running from Selden to Jonathan Wolfsohn. The corporate power of attorney is signed by Tabinda Mahmud. The assessment numbers referenced in the corporate power of attorney are for the notices issued to Ms. Mahmud and not the Selden notices. Ms. Mahmud is identified in the Division's audit report as a responsible officer of Selden.

6. By a memorandum to Frank Landers, Supervisor of the Petition Intake, Review & Exception Unit, BCMS informed the Division of Tax Appeals that the Conciliation Order Dismissing Request (CMS No. 177627) had been rescinded and notification sent to Ms. Mahmud.

7. By letter to Mr. Wolfsohn, dated April 18, 2000, Mr. Landers requested that the petitioner (now identified solely as Tabinda T. Mahmud) execute a Stipulation for Discontinuance of Proceedings upon Recission of a Conciliation Order Dismissing a Request. The stipulation explains that withdrawal of the petition would discontinue the proceeding in the Division of Tax Appeals and allow the matter to be resolved in BCMS without jeopardizing petitioner's right to file a petition within 90 days of the issuance of a Conciliation Order, if petitioner chose to do so.

8. On May 3, 2001, the Division filed the instant motion for summary determination. Petitioner did not file a response.

9. The Division attached to its motion a copy of a Withdrawal of Protest signed by Tabinda Mahmud and dated October 12, 2000. The Withdrawal of Protest references the two notices issued to Ms. Mahmud and CMS number 177627. As relevant here, the withdrawal states:

The final disposition of the claim for credit/refund, reimbursement, deficiency or determination at issue as described above is acceptable to me based on the following recomputation:

Year(s)	6/1/94 - 5/31/97
Tax	-0-
Penalty	-0-
Interest	-0-
Total due	-0-

Just above Ms. Mahmud's signature is the following statement:

I hereby withdraw the protest for redetermination of a deficiency or revision of determination and any refund claim asserted therein and I consent to a discontinuance of the case initiated by the filing of such protest. I waive any right to a conciliation conference and a hearing in the Division of Tax Appeals concerning the above notice. For estate tax purposes, I waive my right to a special proceeding, before the Surrogate Court.

I understand that all refund claims are subject to the approval of the State Comptroller. Accordingly, this withdrawal and discontinuance is conditioned upon the granting of such approval and the payment of the refund.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck*,

Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

To establish that the Division of Tax Appeals lacks jurisdiction over the petition of Ms. Mahmud, the Division submitted a Withdrawal of Protest signed by Ms. Mahmud and dated after the filing of a petition with the Division of Tax Appeals. By executing that document, Ms. Mahmud agreed to withdraw her petition, and the tax assessed against her was canceled. Petitioners did not respond to the Division's motion for summary determination; therefore, they are deemed to have admitted the facts asserted by the Division (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Accordingly, there are no material and triable issues of fact presented. Ms. Mahmud has withdrawn her protest and consequently the Division of Tax Appeals lacks jurisdiction over the petition.

B. The Division's motion for summary determination does not address the petition of Selden Convenience Foodmart, Inc. Accordingly, this determination arrives at no conclusions with regard to Selden's petition.

C. The motion for summary determination filed by the Division of Taxation for an order dismissing the petition of Tabinda Mahmud is granted; the petition of Selden Convenience Foodmart, Inc. and Tabinda Mahmud is dismissed with prejudice as it applies to Tabinda Mahmud; and a hearing will be scheduled in the Matter of Selden Convenience Foodmart, Inc. as soon as practicable.

DATED: Troy, New York
August 9, 2001

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE